BPAC

AGENDA ITEM NO. 4

PUBLIC HEARING AND COMMITTEE RECOMMENDATION: PROPOSED REGULATIONS GOVERNING DETERMINATION OF "EMPLOYEE" STATUS

Attachment D

Written Comments and CalPERS Responses

Law Offices of Scott N. Kivel
200 Kentucky Street, Suite C
Petaluma, CA 94952
707 762-5526 telephone 707 762-5527 facsimile

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VIA FEDERAL EXPRESS

Joe Parilo, Acting Regulations Coordinator
California Public Employees Retirement System
Lincoln Plaza North
400 Q Street
Sacramento, CA 95814

Re: Public Comment to Board of Administration of the California Public Employees' Retirement System Notice of Proposed Regulatory Action: Add Article 6.5. Membership, Sections 578 and 578.1

Dear Mr. Parilo:

The Proposed Regulations Potentially Destroy the Pension Eligibility for Numerous Classified School Employees Who Provide Regional or Inter-Agency Services.

Our purpose in submitting this public comment is to demonstrate that Proposed Regulations Sections 578 and 578.1 misread the law and will potentially eliminate CalPERS eligibility for hundreds, if not thousands, of classified employees of County Superintendents of Schools who engage in regional and/or statewide service delivery in furtherance of California public education. We represent the 58 County Superintendents of Schools in a pending administrative appeal challenging the denial of service credit to some 21 individuals, retroactive to July 1998.

The Proposed Regulations Fail To Address a Co-Employment Situation and Are Instead Directed to Distinguishing Between an "Employee" and an "Independent Contractor."

The Proposed Regulations "Determination of "Employee Status" (and the cited precedential CalPERS decisions) speak to the distinction between an "employee" and an "independent contractor." They fail to address how to identify an "employer" where there may be a co-employment situation. The very narrow common law control test envisioned by the Proposed Regulations fails to address a situation where two employers jointly exercise control over an employee.

This is a critical omission. *Co-employment has been recognized under the Public Employees' Retirement Law.*

The Notice of Proposed Regulatory Action is therefore inaccurate where it states that:

> [t]he California Supreme Court, in 2004, confirmed that the common law employment was *the [only] test* to be used to determine if individuals were employees ...for the purposes of CalPERS eligibility.

Government Code §20610 of the PERL imposes a mandatory duty on County Superintendents to report all non-STRS employees. The California Supreme Court in the *Metropolitan Water District v. Cargill* (2004) 32 Cal.4th 491 specifically concluded that "[n]o legitimate basis exists, however, for finding a coemployment exception to the PERL." Thus, under the Supreme Court's *Cargill* decision, if the County Superintendents share employment control with another employer, that status does not relieve the County Superintendents of their statutory obligation to report those employees to CalPERS.

This view has been adopted by at least two administrative law judges, including a decision adopted by the Board of Administration in May 2006:

> There is no co-employment exception to a CalPERS-covered employer's duty to enroll its employees in CalPERS...The [College] District is a CalPERS-covered employer...[the individual employees] must be enrolled in CalPERS whether or not the SCLS joint powers authority might be considered their co-employer.
> Proposed Decision at p. 31, ¶ 30.[1]

More recently, in a pre-hearing ruling issued in our pending administrative appeal by the County Superintendents, the administrative law judge concluded:

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[1] Respondents Sonoma County Office of Education, Santa Rosa Junior College District, School and College Legal Services of California, Henry, Shumway and Sisneros, CalPERS Case Nos. 6359, 6359B, 6424, 6501; Office of Administrative Hearings Case Nos. N2004080538, N2004080539, N2004120064.

> Second, although CalPERS cites to *Cargill* as authority for rejecting respondents' dual employment arguments, and for finding no co-employment exception to the PERL, *such an interpretation fails to read Cargill in proper context. Cargill* determined that there was no co-employment exception to the employer's reporting duties...Here, respondents posit that so long as one employer is a CalPERS employer, *Cargill* instructs that it must report those employees to CalPERS. Again, without determining the merits of such argument, it is apparent that this theory is not one that was specifically rejected by *Cargill*. Respondents should be entitled to raise it at the time of hearing.
> Ruling dated July 21, 2008, at p. 5, ¶ 7.[2]

In several judicial decisions the California Supreme Court has articulated the controlling principles defining common law employment. Government Code §20125 appears to allow CalPERS to adopt, by regulation, a definition of employment other than that provided by the common law, nonetheless CalPERS cannot claim to follow California common law and then attempt to modify the Supreme Court's decision regarding a co-employer's obligation to report its joint employees.

The Proposed Regulations Impermissibly Modify the Common Law Standard Adopted as California Law by the Supreme Court.

The Proposed Regulations cite to only one Supreme Court decision, *Tieberg v. Unemployment Ins App. Bd.* (1970) 2 Cal.3d 943. Significantly, subsection (b) of Proposed Regulation § 578.1 unilaterally modifies the common law factors for determining employment as articulated by the Supreme Court.

The Proposed Regulation states in relevant part that the right of control need not be "exercised with respect to all details." To the contrary, the California Supreme Court in *Tieberg* restated its previous conclusion that the proper legal definition is simply whether an entity has the *right* to control of the manner and means accomplishing the result desired:

> If the employer has the authority to exercise complete control, *whether or not that right is exercised with respect to all details*, an employer-employee relationship exists.

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[2] Respondents San Joaquin Superintendent of Schools, El Dorado County Superintendent of Schools, and individual respondents; OAH Case No. 2008020205; CalPERS Case No. 8181.

Thus, although the Supreme Court has ruled that California law does not require the *actual* exercise of any control, only the *right* to do so, the Proposed Regulation *requires* the *actual* exercise of control in some manner. In addition to imposing a requirement contrary to California law, this language would give CalPERS the right to determine whether control is exercised in a manner acceptable in CalPERS' view. We submit that CalPERS, as an administrative agency, cannot selectively modify controlling Supreme Court precedent and impose a requirement that is inconsistent with the California Supreme Court's enumerated common law factors.

The Proposed Regulations also ignore other relevant Supreme Court decisions on common law employment, such as *Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341. The Supreme Court in that case announced a further factor in distinguishing between an employee and an independent contractor, and concluded that subdivision of the work to eliminate worker discretion does not vitiate control by the principal. The Proposed Regulations further ignore the Supreme Court's conclusion in *Borello* that:

> [t]he courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or "most significant" consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship.

Moreover, Proposed Regulation § 578.1 omits as a factor in subsection (c) the right to discharge at will, without cause or payment for unperformed work, as strong evidence of the right to control. The California Supreme Court articulated this as a common law factor in *Tieberg*:

> Strong evidence in support of an employment relationship is the right to discharge at will, without cause.

There is no explanation provided as to why CalPERS unilaterally omits this well-settled Supreme Court common law factor.

The Proposed Regulations Fail To Recognize That "Statutory" Employment Is Provided by the PERL.

It is well settled that the Legislature has the right to modify common law. The May 2006 decision adopted by this Board addressed the question of statutory employment as an exception to common law employment:

> CalPERS recognizes the concept of statutory employment (Circular Letter, Publication 963, pp. 3-7)
> Proposed Decision at p.26, ¶ 11.

The Proposed Regulations fail to address the circumstances when a "statutory" employee may be eligible for service credit. *See e.g.* the PERL at Goverment Code §20028(a) (defining employee). For decades, County Superintendents have relied upon statutory authority to employ classified employees, for example, Education Code § 45100 (application of employment statutes to County Superintendents' classified employees whose salaries "are paid out of the County School Services Fund *regardless of the origin of the fund moneys.*")

In our view, the PERL and various Education Code and other Government Code statutes provide recognition by the Legislature that certain classified employees are statutory employees of the County Superintendents and therefore eligible for CalPERS service credit.

In the pending administrative appeal, the ALJ likewise acknowledged that statutory employment Is a colorable argument:

> This case involves two statutory CalPERS employers...Respondents contend that statutory employees constitute an exception to the common law employment test. Without commenting upon the merits of these arguments, respondents are entitled to be heard on this statutory employer legal theory.
> Ruling on Motion *in Limine* dated July 21, 2008, at pp. 4-5 ¶ 6.

Conclusion

In sum, the Proposed Regulations are inconsistent with both judicial and legislative pronouncements. If adopted in their current form, the Proposed Regulations would be subject to legal challenge as contrary to California law. Finally, to the extent

that the enumerated factors in the Regulations form the bases for CalPERS' decision-making as to service credit eligibility, they would generate a massive negative impact on the pension eligibility of classified school employees throughout California.[3]

Very truly yours,

LAW OFFICES OF SCOTT N. KIVEL

Scott N. Kivel, Esq. Robert J. Henry, Esq.

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3 Prior to the adoption of these regulations, it may be prudent to seek review by the Attorney General or outside counsel.